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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

SAMUEL N. MARROQUIN AND RACHEL V. MARROQUIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

1. Whether or not the Federal District Courts have jurisdiction to order refund of cash bonds, or alternatively, whether an alleged but unproven admittedly untimely and invalid assessment can convert a cash bond to a payment.

2. Whether the taxpayers were denied due process by the Fifth Circuit Court of Appeals permitting the government to refute its admissions in the trial court and assert unproven factual allegations in support of its argument on appeal.

3. Whether the taxpayers were denied due process by the Fifth Circuit's refusal to disclose the legal or factual basis upon which it sustained the Federal District Court's dismissal for lack of jurisdiction.

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UNITED STATES OF AMERICA,
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To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Samuel N. Marroquin and Rachel V. Marroquin respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The orders, opinions and decisions relevant to this case are reproduced verbatim in the Appendix attached hereto at the pages shown:

District Court Judgment (granting summary judgment for the United States and denying the Marroquins' motion for summary judgment), unpublished,
dated May 9, 1997 ..... App. 2

District Court Memorandum Opinion Granting Summary Judgment, unpublished,
dated May 9, 1997 ..... App. 3

Fifth Circuit Opinion, unpublished,
dated May 6, 1998 ..... App. 11

Denial of Appellants' Suggestion for Rehearing EnBanc, unpublished
dated July 21, 1998 ..... App. 12

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") was entered May 6, 1998. Appellants' Suggestion for ReHearing EnBanc was filed on May 18, 1998, and denied on July 21, 1998. Under Fifth Circuit local rule no. 35, a suggestion for rehearing enbanc is treated as a petition for panel rehearing and, therefore, this petition is timely.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(l).

This Court should issue a writ in this case because the Fifth Circuit's holding is in direct conflict with:

(1) its own long standing precedent *Ford v. United States*, 618 F. 2d 357 (5th Cir. 1980); and *Thomas v. Mercantile National Bank at Dallas*, 204 F.2d 943 (5th Cir. 1953); as well as its own more recent precedent in *Alexander v. United States*, 44 F.3d 328

(5th Cir. 1995); *Treaty Pines Inv. Corp. v. Commissioner*, 967 F.2d 206 (5th Cir. 1992).

(2) the holding in the Court of Appeals for the Federal Circuit in *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, (April 20, 1998);

(3) this Court's prior decision in *Rosenman v. United States*, 323 U.S. 658 (1945);

This Court should additionally issue a writ because the Fifth Circuit's failure to identify the legal or factual basis upon which it sustained the District Court and the Fifth Circuit's consideration of legal arguments and factual assertions seeking relief from the government's admissions in the trial court failed to satisfy the constitutional requirements of due process.

STATUTES, REGULATIONS AND RULES INVOLVED

The pertinent statutes, regulations and rules are reprinted verbatim in the Appendix attached hereto beginning at:

None.

STATEMENT OF THE CASE

This petition arises from an action to recover money remitted to the Internal Revenue Service ("IRS") in advance of an alleged but unproved and admittedly untimely assessment of tax and interest. At issue is whether advance remittances should be returned to a taxpayer where no timely assessment of the tax is ever made.

The Fifth Circuit had jurisdiction to review this case pursuant to 28 U.S.C. §1291.

1. Statement of the Pre-Petition Facts.

On or about April 15, 1983, the Marroquins filed their Form 1040 Federal Income Tax Return for 1982. For 1982, Samuel M. Marroquin held a thirty-five percent (35%) interest as a general

partner in Owl Investments, a Texas partnership. On their 1982 tax return, the Marroquins claimed losses passed through to them from Owl Investments.

Subsequent to the filing of the 1982 return, the IRS began an examination of Owl Investments. Because the tax audit involved adjustments to the Marroquins' individual tax return which resulted wholly from adjustments to a partnership return subject to §§6221-6233 ("TEFRA")[1] and the related Treasury Regulations, the examination was controlled by the TEFRA procedural rules applicable to determinations of tax liability resulting from adjustments to partnership items, including the statute of limitation for assessment and collection of the amounts at issue. Pursuant to a TEFRA examination of Owl Investments, in 1987, the IRS disallowed the 1982 Owl Investment losses.

In 1988, the IRS offered a blanket settlement to all taxpayers involved in the Hillcrest cases, including the Owl Investment partners. See *Treaty Pines Investments Partnership v. Commissioner*, 967 F.2d 206, 208 (5th Cir. 1992). The Marroquins accepted the IRS settlement offer by letter dated February 29, 1988. The IRS acknowledged receiving the Marroquins' acceptance and a one-year statute of limitations for assessing tax and interest pursuant to the settlement began to run. I.R.C.[2] §6229(f). The limitations period expired on February 29, 1989. The IRS admitted these facts in the trial court proceedings.

On September 13, 1988, Plaintiff Samuel Marroquin was granted leave to file, and filed, his Election to Participate in an action pending in the United States Tax Court with respect to the IRS adjustments to Owl Investments for 1982. *Owl Investments Partnership, Robert F. Stadsvold, A Partner Other Than the Tax Matters Partner v. Commissioner,* Docket No. 15616-87. On September 15, 1988, Samuel Marroquin filed an amended petition in the Tax Court with respect to the 1982 Owl Investments partnership adjustments. In his amended petition, Marroquin asserted that the

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[1] Partnership procedures codified at 26 U.S.C. §§6221-6233, as enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 (hereafter "TEFRA"), and as thereafter amended.

[2] Unless otherwise indicated all references to the "Internal Revenue Code," "I.R.C.," the "Code," "section," "Sec." or "§", shall be to the designated section of 26 U.S.C., as amended and effective for the years at issue.

statute of limitations for assessing any tax liability resulting from adjustments related to Owl Investments had expired prior to the commencement of the Tax Court proceeding in 1987. Marroquin argued that the IRS had relied on an extension of the statute of limitations which was invalid because it was signed by an unauthorized party on behalf of the partnership (the "Hickman Extension").

On November 17, 1988, Jane C. Bergner, counsel for the Marroquins at that time, sent to Jeffrey N. Kelm, the IRS project attorney for the Hillcrest cases, a specific request that the Marroquins be allowed the benefits of a revised and new Owl Investments partnership settlement which was being discussed with respect to other Hillcrest partners. The original February 29, 1988 blanket settlement accepted by the Marroquins disallowed all deductions related to Owl Investments, but did not address whether the statute of limitations for assessing any resulting tax deficiencies had expired. Because of the specific hazards of litigation with regard to the invalid Hickman Extension, the second settlement allowed the taxpayers deductions equal to 1⅛ times the cash the specific partner had invested.

On December 13, 1988, Ms. Bergner wrote to Ms. Judith Norris of the IRS and indicated that the Marroquins would tender "payment" of their 1982 tax deficiency. The language in Ms. Bergner's letter, specifically her reference to allocation of the "payment," is from Revenue Procedure 84-58 which allows an advance remittance to be treated as a payment for purposes of allocating a portion of the remittance to tax and a portion to interest. *Thomas v. Mercantile Nat'l. Bank*, 204 F.2d 943 (5th Cir. 1953), makes it clear that regardless what language Ms. Bergner used, a remittance in advance of an assessment is **not** a payment.

On December 28, 1988, the Marroquins made an advance remittance of $185,914.00 to the IRS. On March 23, 1989, the Marroquins made a second advance remittance of $1,490.07 to the IRS.

The Marroquins' remittances were based upon the *anticipated*, but not yet agreed, **new** settlement and not upon the settlement which had been accepted on February 29, 1988, and, therefore, were not in satisfaction of an income tax liability then due and payable. At the time of the remittances, the Marroquins continued to assert that their February 29, 1988, settlement, though binding as to partnership items, did not preclude their continued defense that the

relevant statute of limitations barred assessment of any resulting tax computation. (This was the legal issue ultimately decided in the taxpayers' favor in *Alexander v. Commissioner*, 44 F.3d 328 (5th Cir. 1995) (holding that settlement of partnership items did not preclude subsequent refund claim based on expiration of statute of limitations for assessment).) At the time the Marroquins made their remittances, the Government had not yet agreed to a revised settlement based on the TEFRA statute of limitations defense. The amounts tendered were merely in *anticipation* of a potential liability and **not** in satisfaction of the liability that would have been computed under the February 29, 1988, settlement.

On February 27, 1989, the IRS sent the Marroquins a letter acknowledging their acceptance of the original blanket settlement on or before February 29, 1988. Additionally, Jeffrey Kelm, the same IRS District Counsel who had previously discussed the terms of the second settlement with Ms. Bergner, filed with the United States Tax Court a pleading titled "Notice of Settlement." In that Notice, the IRS **affirmatively** represented that Samuel N. Marroquin had entered into a settlement agreement in 1988, and that Mr. Marroquin was no longer a party to that proceeding. The "Notice of Settlement" was clearly in response to the Marroquins' acceptance of the blanket settlement in 1988. It is **absolutely** and **abundantly clear** that the Government ***knew*** that the settlement had become effective in 1988, which would have begun the one-year statute of limitations for assessment under §6229(f). The government admitted this in the trial court proceedings.

As of January 30, 1989, Appeals Officer Judith Norris had received the remittances from the Marroquins but, by her own admission, those remittances had not yet been posted to the account of the taxpayers. Ms. Norris indicated that the monies would be credited to the account of the Marroquins, but she did not make any representations about an assessment.

On February 27, 1989, two days before the expiration of the statute of limitations for assessment pursuant to the February 29, 1988, settlement acceptance, Appeals Officer Linda Lopez from Austin, Texas, by-passed their attorney-of-record, Ms. Bergner, and sent a letter directly to the Marroquins notifying them that the attorneys for the Government and the partnership had re-evaluated the settlement related to Owl Investments and were offering a new settlement to the Marroquins.

The Marroquins signed a closing agreement encompassing

the terms of the new settlement on March 21, 1989. That closing agreement was accepted on behalf of the Commissioner on May 10, 1989. That closing agreement was signed and accepted ***after*** the statute of limitations for assessment pursuant to the February 29, 1988, settlement had expired. That closing agreement addressed issues not resolved in the February 29, 1988, settlement, including the timeliness of the original TEFRA FPAA, issues regarding subsequent tax years, penalties, and the application of §6621(c) to any deficiencies. The closing agreement included a binding agreement that the parties would treat the original Notice of Final Partnership Administrative Adjustments ("FPAA") as timely issued, but it did not contain any agreement that the statute of limitations for assessment triggered by the prior settlement had not expired. The new settlement and the closing agreement did **not** extend the §6229(f) one-year statute of limitations for assessment of any tax resulting from the February 29, 1988 settlement.

The IRS should have assessed the entire liability based on the February 29, 1988 settlement before March 1, 1989, and then abated any excess assessment if and when the new settlement was consummated. Instead, they concealed their failure to timely assess by accepting the new agreement after the statute of limitations expired and then keeping the Marroquins' cash bond. There was no way for the taxpayers to realize the IRS had not made a timely assessment.

Furthermore, irregularities in the IRS's own records indicate that a formal, procedurally proper assessment may have never been made. On June 12, 1989, the IRS adjusted the Marroquins' 1982 tax account by posting to its computer records two entries as follows:

340	Interest Assessment	06-12-89	98,682.07
300	Additional Tax Assessed By Examination	06-12-89	88,722.00.

The computer postings were made after the February 29, 1989 limitations period for making assessments. §6229(f). The Government has offered no credible evidence that the tax liability was ever formally "assessed" by execution of a Form 23C by an assessment officer. The mere posting of a liability to the computer system is not an assessment. *Brafman v. United States*, 348 F.2d 863 (5th Cir. 1967).

On June 9, 1989, the IRS returned $214.10 of the advance

remittance to the Marroquins. This refund was made three days prior to the alleged June 12, 1989, assessment the earliest time pursuant to which it could have been determined that there was an overpayment. The Government's assertion that there was even a formalistic assessment on June 12, 1989, is suspect and unsupported by credible evidence.

The Government admitted and District Court found that the alleged June 12, 1989, assessment was made after the statute of limitations for assessment and collection of the tax had expired.

The Marroquins were never sent a notice and demand for payment following an assessment as required under §6303. They never received any notice of the actual assessment date.

On or about June 22, 1995, the Marroquins filed claims for refund of the amounts remitted to the IRS in 1988 and 1989. On March 14, 1996, the IRS notified the Marroquins that it could not allow their claim for refund. No formal notice of disallowance was made by certified mail as required by §6532.

2. Proceedings in the Tax Court and Post-Petition Facts related to the Sanctions Issue.

The Marroquins filed their Original Complaint on April 1, 1996. The court entered an order which scheduled the parties to file simultaneous cross motions for summary judgment.

In their motion for summary judgment, among other arguments, the Marroquins asserted that the Government had failed to prove that any assessment had ever been formally made, and that assuming an assessment had been made, it was untimely and of no force and effect for recategorizing the advance remittance as a payment of tax. The Marroquins sought recovery in the amount of $187,404.07.

The Government conceded that the assessment had been made after the statute of limitations for assessments had expired, but moved for summary judgment on the grounds that the Marroquins' claim for refund was barred by the statute of limitations and, alternatively, that the Marroquins owed and voluntarily paid the tax; therefore, there could not be an overpayment which would allow them to receive a refund.

On May 9, 1997, the court granted the Government's motion for summary judgment, denied the Marroquins' motion for summary judgment and dismissed the Marroquins' suit. In its Memorandum

Opinion Granting Summary Judgment, the court held that the Marroquins did not timely file their refund claim, finding that it had not been filed within two years after the assessment which it held converted the deposit to a payment. The court commented upon, but did not rule on, the Marroquins' argument that an untimely assessment is invalid and of no force and effect for converting an advance remittance into a payment of tax. The court did not even directly address whether the Government had proven that an assessment of tax had ever been made.

3. **Proceedings on Appeal.**

The Marroquins appealed to the Fifth Circuit from the district court's final judgment. (The Marroquins also appealed from the district court's denial of their motion to strike evidence that the United States offered in its motion for summary judgment and response, but had not previously disclosed to the Marroquins. That denial is not at issue in this petition.)

On appeal, the United States attempted to assert, for the first time, that the Marroquins had not disclosed that they entered into a subsequent settlement with the IRS. The Government argued that it had been induced to entered into its previous stipulation that the July 12th assessment was untimely based upon the Marroquins' alleged misrepresentation. The Marroquins exhaustively disproved that allegation in their reply brief. No evidentiary hearings were held and the case was not remanded to the district court.

After briefing and oral argument, the Fifth Circuit entered its opinion affirming the district court's judgment in favor of the United States, dismissal of the case, and denial of the Marroquins' motion for summary judgment.

On May 18, 1998, the Marroquins filed their Appellants' Suggestion for Rehearing En Banc. As grounds, the Marroquins asserted that the Fifth Circuit's opinion is contrary to prior decisions entered by that court in *Alexander v. United States*, 44 F.3d 328 (5th Cir. 1995); *Treaty Pines Inv. Corp. V. Commissioner*, 967 F. 2d 206 (5th Cir. 1992); *Ford v. United States*, 618 F. 2d 357 (5th Cir. 1980); and *Thomas v. Mercantile National Bank at Dallas*, 204 F.2d 943 (5th Cir. 1953); holdings in other courts of appeals, particularly with the holding in *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, (April 20, 1998); and this Court's prior decision in *Rosenman v. United States*, 323 U.S. 658 (1945). Under

it's local rules, the Fifth Circuit treated the suggestion for rehearing enbanc as a petition for rehearing. On July 21, 1998, the court denied the suggestion.

REASONS FOR GRANTING THE PETITION

It is unclear on precisely what grounds the Fifth Circuit affirmed the district court's dismissal for lack of jurisdiction. There are several possible alternative interpretations that could be given to the affirmation.

1. If the Fifth Circuit affirmed the district court's dismissal based upon a conclusion that the Government's assessment was timely because the taxpayers failed to establish that there was a first settlement as of February 29, 1988, then this case should have been remanded for further proceedings rather than the dismissal affirmed. The Government had conceded that the statute of limitations barred the assessment in the trial below acknowledging that *Treaty Pines* controlled. Based upon those admissions, no attempt was made to put into evidence any further evidence that there was a February 29, 1988 settlement. To affirm the dismissal for lack of jurisdiction as a consequence of the taxpayers' not producing evidence with respect to an issue the Government had conceded and not raised until the appeal would be grossly unfair and inappropriate. It is a violation of the minimum requirements of due process. If this was the basis of the court's opinion, then the Marroquins assert that the court should have remanded the case for further proceedings below rather than affirming the district court's dismissal for lack of jurisdiction.

2. If the affirmation of the dismissal for lack of jurisdiction was based upon the Fifth Circuit's conclusion that the court did not have jurisdiction over the refund of a cash bond to the taxpayers, then the Marroquins seek review because that was a case of first impression for that court and that opinion appears to be in direct conflict with the recent decision of the Court of Appeals for the Federal Circuit in *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997), *cert. denied*, (April 20, 1998). In that case the Court of Federal Claims and the Federal Circuit determined that federal district courts do have jurisdiction to hear and rule on an action to recover an advance remittance. This Court denied the Government's petition for certiorari in that case. A determination as fundamental as that of whether or not the federal district courts have

jurisdiction over such an important matter should be determined by this Court.

3. If the dismissal for lack of jurisdiction was affirmed based upon a conclusion that a time-barred assessment should be given legal effect to convert the cash bond to a payment, then such determination constitutes a reversal of *Mercantile* and *Ford v. United States*, 618 F.2d 357 (5th Cir. 1980), and this Court's opinion in *Rosenman v. United States*, 323 U.S. 658 (1945).

4. If the court's affirmation of the dismissal for lack of jurisdiction was based upon a determination that a remittance made in advance of an assessment may be a payment rather than a cash bond, then that determination is a clear reversal of the rule established in *Mercantile* and *Ford*. Furthermore, because the Appellants were still contesting any liability for payment of a tax deficiency at the time of the remittance of their funds to the Internal Revenue Service, even under the doctrines adopted by other circuits and under any interpretation of *Rosenman v. United States*, 323 U.S. 658 (1945), the amount initially remitted by the Marroquins to the Government was merely a cash bond when tendered to the Government.

5. If the court's affirmation of the dismissal for lack of jurisdiction was based upon a determination that the events as to the Marroquins' acceptance of the Government's settlement offer on February 29, 1988 did not constitute an offer and an acceptance of a project-wide settlement offered by the IRS, then that conclusion is a clear reversal of the Fifth Circuit's findings in *Treaty Pines*.

6. If the court's determination was based upon a conclusion that any settlement as to partnership items also results in a concession by the taxpayer of the defense that the statute of limitations barred assessment of any liability computed based upon the specific items agreed to be adjusted in the partnership item settlement, then that conclusion is a direct reversal of the precedent set in *Alexander*.

Without further clarification, the Marroquins can only interpret the Fifth Circuit's affirmation as a determination that (i) if the claim is for refund of a cash bond, the district court is without jurisdiction, or, alternatively, (ii) if the claim is for refund of tax paid it was untimely, and therefore the court does not have to determine the issue of whether or not the bond was converted to a payment.

The issues presented in this case are of sufficient legal significance and with regard to many of them, there is a sufficient split of authorities among the Circuits that this case should be

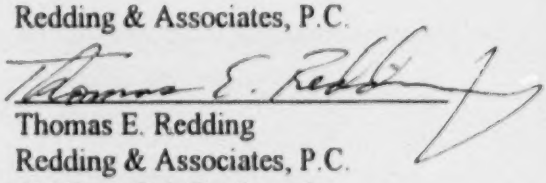
reconsidered. This Court should grant writ of certiorari.

CONCLUSION

At a bare minimum, the taxpayers should be entitled to a clear statement of the legal analysis and fact findings upon which the determination was made to deny the taxpayers access to a forum in which to pursue their claim by sustaining a dismissal for lack of jurisdiction. The failure to enter such findings of fact and conclusions of law by the Fifth Circuit denies the taxpayers due process. Additionally, the issues in this case are such fundamental questions of tax law that this Court should consider the case and render its own ruling on the issues presented.

Redding & Associates, P.C.

Date: October 19, 1998



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APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SAMUEL N. MARROQUIN and RACHEL V. MARROQUIN, Plaintiffs	§ § §	
vs.	§ §	CIVIL ACTION NO. H-96-1034
UNITED STATES OF AMERICA Defendant	§ §	

FINAL JUDGMENT

Pursuant to the Memorandum Opinion entered in this case, the Court grants the defendant's motion for summary judgment, denies the plaintiff's motion for summary judgment, and dismisses the plaintiffs' suit.

This is a Final Judgment.

Signed this the 8th day of May, 1997.

KENNETH M. HOYT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SAMUEL N. MARROQUIN and RACHEL V. MARROQUIN, Plaintiffs	§	
vs.	§	CIVIL ACTION NO. H-96-1034
UNITED STATES OF AMERICA Defendant	§	

MEMORANDUM OPINION GRANTING SUMMARY JUDGMENT

I. Introduction

Pending before the Court are the motions for summary judgment filed by the plaintiffs and the defendant in this tax case. The plaintiffs are seeking a refund of income taxes paid for 19832, plus interest. After considering the pleadings, motions, and applicable law, the Court is of the opinion that summary judgment should be entered in favor of the defendant.

II. Statement of Facts and Procedural History

The plaintiffs invested in a tax shelter in the 1980s that was later determined to involve sham transactions in government securities to generate fictitious tax losses for investors. *See Treaty*

Pines Inv. Corp.v. Commissioner, 967 F.2d 206, 208 & n.1 (5th Cir. 1992) (describing the investment scheme that involved as many as 7,000 taxpayers). The plaintiffs filed a joint federal income tax return in 1983 showing an ordinary loss in the amount of $419,790 for 1982 as a result of the investment. The Internal Revenue Service (IRS disallowed the losses and offered a blanket settlement to all partners involved in the investment. The plaintiffs accepted the IRS's settlement proposal on February 29, 1988, and in December of that year the plaintiffs sent the IRS a check for $185,914 in partial payment of the tax and interest due. In March of 1989, the plaintiffs' attorney sent an additional check for $1,699.87.

On June 12, 1989, the IRS assessed the 1982 income tax and interest against the plaintiffs. The United States conceded that the assessment was made after the one-year statute of limitations for assessments. *See* 26 U.S.C. §6229(f). The IRS should have assessed the plaintiffs' tax deficiency by March 1, 1989, one year after the plaintiffs accepted the IRS's settlement offer.

The plaintiffs filed a claim for a refund on June 26, 1995. The IRS denied the claim, and the plaintiffs filed this lawsuit. The United States argues that the plaintiffs' lawsuit is barred by the statute of limitations contained in 26 U.S.C. §6411(a), which provides that

a claim for credit or refund must be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. For the plaintiffs to timely file their claim, the United States argues, they should have filed it by June 12, 1991, two years after the date of assessment, when the tax is deemed to be "payed" under the Fifth Circuit precedent.

The plaintiffs argue that the IRS's untimely assessment was not an assessment at all because it was made after the one-year statute of limitations for assessments. They contend that a remittance prior to a valid assessment is a deposit and not a payment for purposes of the section 6511 statute of limitations for refund claims. If there has never been as assessment, they argue the statute of limitations never began to run, and their claim to a refund is absolute.

III. Discussion and Authorities

The question before the Court is whether the plaintiffs may claim a tax refund six years after the IRS made an untimely assessment of taxes. The Internal Revenue Code establishes the limitations for credit or refund claims. It states that "[c]laim for credit or refund of an overpayment of any tax imposed by this title . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever

of such periods expires the later . . . ." 26 U.S.C. § 6511(a). It goes on to state unequivocally that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) . . . unless a claim for credit or refund id filed by the taxpayer within such period." *Id.* §6511(b)(1). The statute also provides that a refund is erroneous and void "[i]f made after the expiration of the period of limitation." *Id.* at § 6514(a)(1).

In this case, the two-year period would be the later date. The plaintiff argues that the taxes were never "paid," according to Fifth Circuit precedent, and that, therefore, the statute of limitations cannot begin to run.

The Fifth Circuit addressed the meaning of the term "payment" under section 6511 in *Ford v. United States*, 618 F.2d 357, 358 (1980). In *Ford*, the Fifth Circuit followed its earlier *per se* rule that, absent a formal assessment of a tax deficiency, there can be no payment of tax. *Id.* at 360-61. As a result, even though the taxpayers sent a check to the IRS for their tax deficiency, the taxes were not deemed "paid" until the date of the formal assessment. *Id.* at 359. Therefore, the statute of limitations did not begin to run until the IRS made its formal assessment of tax. *Id.* at 358-59.

Despite this holding, the court expressed strong reservations

about such an "unbending" rule that preassessment tax remittances would never constitute payment, but state that it had not authority to overturn the decision of an earlier panel of the Fifth Circuit unless the circuit did so *en banc*. *Id.* The panel urged *en banc* consideration to overturn the previous decision in *Thomas v. Mercantile National Bank*, 204 F.2d 943 (5th Cir. 1953), that established the *per se* rule. However the circuit has not yet followed the *Ford* panel's advise, and the decision is still good law, notwithstanding that the other circuits disagree with this inflexible definition of "payment."

This Court need not question the wisdom of the *per se* rule, because regardless of its application, the plaintiffs still failed to file their lawsuit within two years of the assessment. An untimely assessment cannot be construed as no assessment, as the plaintiffs assert; it triggers a taxpayer's right to file for a refund of his overpayment. *Cohen v. United States*, 995 F.2d 205, 209 (Fed. Cir. 1993); *Ewing v. United States*, 914 F.2d 499, 504 (4th Cir. 1990). The Internal Revenue Code defines "overpayment" as including "that part of the amount of the payment if any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto." 26 U.S.C. § 6401(a). As one revenue ruling explained:

> Any payment of tax that was assessed and paid after the expiration of the period of limitations on assessment constitutes an overpayment under section 6401(a) of the Code which should be refunded under section 6402(a) *if the taxpayer had filed a timely claim for refund* in accordance with section 6511(a).

Rev. Rul. 74-580, 1974-2 C.B. 400 (emphasis added).

In this case, section 6511(a) mandates that the plaintiffs should have filed their claim for a refund within two years after the date of assessment, when the taxes are deemed "payed." Therefore, the plaintiff are barred from filing a claim six years after the IRS made its untimely assessment of taxes. The IRS's untimely assessment does not extend the timeframe within which the plaintiffs must file a refund claim.

The Supreme Court rejected such reasoning when it held recently that equitable tolling could not be used to extend the statute of limitations on tax refunds. *United States v. Brockamp*, 117 S.Ct. 849, 853 (1997). There, the Supreme Court found the tax code's limitations period to be clear and unequivocal, noting that section 6511 "sets forth its time limitations in unusually emphatic form." *Id.* At 851. The Supreme Court also reasoned that Congress intended such provisions of the tax code to "provid[e] the Government with strong statutory protection against stale demands.'" *Id.* At 853 (citing

United States v. Garbutt Oil Co., 302 U.S. 528, 533 (1938)).

Even if the Court were to accept the plaintiff's argument that the taxes were not "paid" under the statute, section 6511(a) provides that the limitations period is "3 years from the time the return was filed *or* 2 years from the time the tax was paid timely, whichever of such periods expires later." 26 U.S.C. § 6511(a) (emphasis added). The three year-period after the return was filed would apply regardless of any "payment," and the plaintiffs would have had to file their claim by 1986, three years after they filed their tax return, in order to have a timely claim. In either instance, the plaintiffs failed to bring their claim in a timely manner and may not do so at this late date. As a result, summary judgment for the defendant is appropriate.

IV. Conclusion

For the above reasons, the Court grants the defendant's motion for summary judgment, denies the plaintiffs' motion for summary judgment, and dismissed the plaintiffs' suit.

Signed this the 8th day of May, 1997.

KENNETH M. HOYT
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20555

SAMUEL N MARROQUIN; RACHEL V. MARROQUIN,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(H-96-CV-1034)

Before KING, SMITH, and STEWART, Circuit Judges.

PER CURIAM:***

We have reviewed the briefs filed by counsel for the appellants and by counsel for the United States and the record, and we have benefitted from very fine oral argument by both counsel. For essentially the reasons given by the district court and other reasons given by the United States in its brief and during argument, we conclude that the district court correctly granted summary judgment in favor of the United States dismissing the appellants' suit.

The appellants' refund claim was untimely.

AFFIRMED.

All pending motions are hereby DENIED.

*** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20555

SAMUEL N MARROQUIN; RACHEL V. MARROQUIN,
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v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 5/6/98, 5th Cir., _____, _____ F.3d _____)

Before KING, SMITH, and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehaering En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehaering En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

CERTIFICATE OF SERVICE

This is to certify that

(i) three copies of the foregoing Petition for Writ of Certiorari were mailed by certified mail, return receipt requested, on October 19, 1998 to:

Solicitor General of the United States,
Department of Justice, Room 5614
10th Street and Constitution Ave., N. W.
Washington, D. C. 20530

(ii) one copy of the foregoing Petition for Writ of Certiorari was mailed by certified mail, return receipt requested, on October 19, 1998 to Counsel for the Internal Revenue Service:

Mr. Gary R. Allen
Department of Justice, Tax Division
P. O. Box 502
Washington D. C. 20044

and,

(iii) three copies of the foregoing Petition for Writ of certiorari were mailed by certified mail, return receipt requested, on October 19, 1998, to:

Commissioner of Internal Revenue
Washington, D. C. 20224

Date: 10/19/98

Thomas E. Redding